which never would have accrued to genius alone. Vitet, Director of the French Academy, gives the following just analysis of his prominent characteristics: —

"His wit was supple, inventive, adroit, never-tiring, full of unexpected turns and sprightly sallies. Eager for success, he knew how to bear failure; he was impatient only of repose. One success only urged him to attempt another. His most dazzling triumphs served but as a spur to his activity. Thus for fifty years his inexhaustible talent was employed in the service of four theatres at one and the same time. He devised plots by hundreds, created characters, imparted to the improbable all the charms of reality, accomplished in his single person more, perhaps, than all his rivals together, and, rounding off a half-century of labor, has left us the charming recollection of his talents and his virtues."

ART. III. — *The Trial of the Constitution.* By SIDNEY GEORGE FISHER. Philadelphia: J. B. Lippincott & Co. 1862.

THE trial of the Constitution has been in progress ever since it was adopted. At that time the authority of the nation, as it existed under the Revolutionary government, and under the Confederation, had become practically extinct, for the want of power to enforce such ordinances and requisitions as it was constitutionally authorized to make. The national authority had to be organized anew, and on the basis of an entirely new fundamental law. The only practically efficient power was then exercised by the local authorities, not by constitutional right, but by usurpation against the national authorities, who were denied the power to perform their own constitutional duties, or even to defend their own existence. They could not protect their own frontiers, execute their own laws, pay their own debts, fulfil their own treaties and contracts, or even defray the necessary expenses of their own nominal administration.

It was necessary to make an entirely new adjustment of the relative powers and duties of the general and local governments. Obviously this could not be done by those governments

themselves, by any treaty, league, or contract among them. It could be done only by the whole people, who had a right to control all the powers, general or local, to be exercised under or upon themselves. Accordingly, the Constitution was made by them, distributing so much of their power as they chose to delegate, and establishing the law, and the jurisdiction, by which every claim of power under them, or any of them, must be finally adjudicated and settled.

But this distribution was not made by parcelling out the powers numerically to the one government and to the other, saying that the general government shall have this, and the State governments that, and so on through the catalogue. They foresaw that such a course would place the governments in collision at every step. Alexander Hamilton said "that no boundary could be drawn between the general and State legislatures"; and Mr. Madison said substantially the same: "To draw the line between the two is a difficult task. I believe it cannot be done." The Convention and the people were apparently of the same opinion, for they made no such attempt. They conferred no powers on the State governments, in reference to their local jurisdiction. They assigned to them certain *duties* in relation to the administration of the general government, and growing out of the provisions of the Constitution. But the Legislature of Virginia, in their elaborate Resolutions of February, 1820, on the Missouri restrictions, ask emphatically, "What rights are *conferred* by the Federal Constitution? Upon the federal government," they answer, "many; upon the State government, or upon the citizens, none; one only excepted, the right of a citizen of one State to the privileges of a citizen in all the States." While nothing is *conferred*, there is but one existing power specially and expressly *reservea* by the Constitution to the States; and that is "the appointment of the officers, and the authority of training the militia according to the discipline provided by Congress."

Instead of conferring powers on the States, what they actually attempted and did was to "establish this Constitution for the United States," "in order" to effect six specified objects, by means of the execution of certain powers therein granted, which powers were to be carried into execution by any "laws,

necessary and proper" for the purpose. The Constitution and laws so made were to be "supreme" over all other laws and institutions whatever; and any powers of the people not thus "delegated" to their government were "reserved" to themselves or to the States.

The Constitution was much opposed in the general and State Conventions, previously to its adoption, and obviously on grounds other than those most loudly insisted on in debate. These were generally too insignificant to be supposed capable of influencing the minds of sober men, when acting on a subject of momentous import; yet it is worthy of note, that the determined opponents of the national system never abandoned the most futile exception that was ever alleged against its details.

When the system first went into actual operation, few topics of internal regulation pressed on the immediate attention of the general government. While the external relations of the country demanded much attention, domestic affairs were naturally permitted to keep mostly in their former course. It had been foreseen and foretold that the operations of the general government would be most extensive and important in times of war and danger; and those of the local governments in times of peace and security.* Such a beginning tallied well, for the time, with the policy of both parties. The friends of the new system were naturally desirous to avoid any unnecessary alarm or agitation of the public mind, or excitement of old prejudices, by unlooked-for changes, before the beneficent character of the agent had approved itself to the understanding, by a practical application of its remedial powers to the more immediate and palpable evils connected with the international relations of the country. Their opponents were certainly not less pleased with a course of events, which, while it removed the national government to the greatest distance from the people, and reduced it, in their view, to the smallest dimensions, left everything in which they had occasion to recognize the action of government to the management of the local authorities, thus magnifying their importance at the expense of the national.

* Federalist, No. 45.

This method of beginning tended to establish an idea precisely the reverse of the plan of the Constitution ; giving to the States all the general powers of ordinary government, and *reserving* to the United States only such extraordinary powers as the States separately could not execute ; whereas the Constitution first vests in the United States government the control of all the means " necessary and proper," or appropriate and convenient, for executing the provisions of the Constitution, and every part of it, and then *reserves* to the States or the people any residuum of power not so delegated. This error has inflated some of the States with the idea, that supreme sovereignty belongs exclusively to them ; that they are entitled to the primary allegiance of the people ; and that consequently all that is left — *reserved* to the United States — is the right to be seceded from, just when any State may choose.

The direct results are seen in our present experience. The rebellion, however, is only one of these results. The Constitution has, in the mean time, attained a gradual development, and a settled practical construction of some of its powers, and is now, under the discipline of this rebellion, developing itself more rapidly and more beneficially than at any former period of our history. It is our present purpose to note some of the points in which a progress has been made, or is now making, in this regard.

" Fas est ab hoste doceri." In our endeavors to ascertain the true character of our Constitution, and of the government instituted by it, the importance of the views entertained and expressed by its opponents ought not to be overlooked. Their ostensible principle being jealousy of power, and their vocation to defeat the grant, or weaken its exercise, by exciting the prejudices and fears of the people, they were more astute and persevering in finding out what might be done, than its friends in designating minutely what ought to done, under it. In perfect accordance with these opposite views, the opponents of the Constitution developed and exposed the particular forms and modes in which the government would be able to interfere with or influence the ordinary course of events to the annoyance of the people ; while its friends, without denying or discussing these particulars, usually contented themselves with

proving that the powers in question were necessary for the legitimate purposes of government, at the same time admitting that "the legislative power, however formed, would, if disposed, be able to ruin the country," and that universal "distrust was inconsistent with all government."

Under these circumstances it is obvious that we are to look for an authentic and undisputed, as well as unfriendly, interpretation of the Constitution, among the contemporaneous sayings and doings of its adversaries. This was the interpretation under which they put it to the people for their judgment, and under which it was approved and adopted. Such a construction would be likely to include all the powers on which the friends of the Constitution relied to give it the efficiency which they contended it ought to have, in order to make it what they were expected to produce, — a "firm national government," as understood by the Congress which instituted the Convention.

It is to be recollected that the Convention of 1787 was assembled under the direct sanction of the Congress of the United States, for the "express purpose" of making such provisions as should, when agreed to and adopted, render the "Constitution adequate to the exigencies of government and the preservation of the Union." The Union was not then to be formed, nor nationality to be inaugurated. Both these had been done thirteen years before, by the Congress of the Revolution. They pronounced our Union perfect, and proceeded to assume and exercise, "in the name and by the authority of the people," the rights and powers of distinct nationality and absolute sovereignty. They and their immediate successors levied war, raised and maintained armies, equipped navies, contracted alliances, and regulated the foreign commerce of the country. By the Declaration of Independence they rendered this national unity and sovereignty perpetual and irrevocable. They, not as individual States, but as "ONE PEOPLE," dissolved the political bands which had connected them with *another* people, and assumed a separate and equal station among the powers of the earth, specifying particularly the rights of a perfect sovereignty. Again in 1781, by the Articles of Confederation, including similar powers of national sovereignty, the faith of the people is solemnly plighted and engaged, "that the Union shall be perpetual."

The Congress of the United States, which was the government, decided and announced "that there are defects in the present Confederation," and the task therefore assigned to, and assumed by, the Convention, was to provide a Constitution adequate to the preservation and government of such a Union. There can be no doubt that every member of the Convention who favored this great object entered fully into the views of the Congress of the United States, and intended to adopt what appeared to him "the most probable means of establishing in these States a firm national government." In this Convention neither the independence, unity, sovereignty, or nationality of the country was discussed or questioned, and their labors were concentrated on the modes of organizing a government of adequate power to preserve and defend them.

Their first Resolution, which lay at the foundation of all they afterwards did, and was not departed from, was in these words: "That a national government ought to be established, consisting of a supreme legislative, executive, and judiciary." It was adopted on full consideration, and was considered as settling the great principle, that the new government should act directly upon the people of the whole nation, and not indirectly, like the Confederation, through the medium of the State governments. It was proposed and insisted on by the Virginia and South Carolina delegations, and was practically carried out when their work announced itself to be a Constitution of the United States, and the first three Articles made provision for the legislative, executive, and judicial departments.

All this was well understood both by friends and foes. Judge Yates, a most zealous and persevering opponent of the whole scheme,—who resisted it in the Convention, and finally retired in disgust, resisted it before the people, in the Convention of New York, and, like his class of politicians generally, scarcely ceased when the Constitution became the supreme law,—says that when, in the discussion of this first Resolution, it was asked, whether the State governments were to be annihilated, "It was answered, 'Only so far as the powers intended to be granted to the new government should clash with the States, when the latter were to yield.'" What was intended, and actually accomplished by the Convention, could not now be better

stated in so few words than it was seventy-five years ago in this language of Chief Justice Yates. They intended to establish a fundamental law for the purpose of effecting certain great national objects, to make it the duty of their government to accomplish those objects, and to give it, almost without limitation, the means of doing so. State governments, and whatsoever else stood in the way of the legal operation of this supreme law, were to be superseded. Whatever the national government could rightfully and constitutionally do, was law; and nothing was "reserved" for the States but what it could not do, — what was "not delegated to the United States." He and his colleague, Chancellor Lansing, said that the object was "the consolidation of the United States into one government," and to "deprive the State government of its most essential rights of sovereignty, and to place it in a dependent situation." Mr. Lansing said, "I am not authorized to accede to a system which will annihilate the State governments, and the Virginia plan is declarative of such extinction." Gouverneur Morris told them, "that in all communities there must be one supreme power, and one only." Alexander Hamilton said that "two sovereignties cannot coexist within the same limits." Mr. Madison said, "If we do not *radically* depart from the federal [i. e. confederate] plan, we shall share the fate of ancient and modern confederacies." Mr. Gerry agreed with Messrs. Yates and Lansing that the Constitution was "a system of national government." Mr. George Mason said that Congress might "extend their powers as far as they should think proper; so that the State legislatures have no security for the powers presumed to remain to them." The Constitution, said Mr. Lansing, "absorbs all power, except what may be exercised in the little local matters of the States, which are not objects worthy of the supreme cognizance." The fundamental Resolution in favor of a National Government was brought directly into competition with a Confederacy of the States, and debated, after a postponement for preparation, for three successive days, when the confederate plan was rejected by a decisive vote.

Immediately on the organization of the government all this language of the State Rights party was at once changed and

contradicted. Instead of great and undefined powers, they now said that the Constitution gave very few and strictly limited powers, so that they found almost every proposed act of the government absolutely unconstitutional, on account of the straitened limits of its authority. Even so necessary a law as the first one enacted, providing for administering and recording the official oaths prescribed by the Constitution, and essential to enable the officers to act at all in their official capacities, and to set the machine in motion, was objected to on the ground of a want of constitutional power to enact it. But since the present rebellion the State Rights party have admitted and reaffirmed the truth of the original interpretation, by inserting such provisions in their own Constitution as make it conform to their views; and at the same time have convicted themselves of dishonesty in their endeavors to make us believe that our Constitution meant the same thing without their alterations, as they have made their own to mean by them.

Notwithstanding "this Constitution" is declared on its face to be "the supreme law of the land," and the President, in whom the executive power is vested, is expressly required to "take care that the laws be faithfully executed," and is under the solemn obligations of an oath to do so; and notwithstanding Congress is under equal obligations "to make all laws necessary and proper to carry into execution the powers" thus vested in this or in any other department of the government, occasions have not been wanting for denying to the general government adequate power to execute the fundamental law which it was created to administer. Such an objection to the execution of the whole Constitution, and every part of it, including every rule, order, precept, right, duty, or prohibition it contains, will hardly be listened to hereafter. A duty imposed implies a power to perform it. "No maxim," said Mr. Madison, "is more clearly established in law, or in reason, than that, wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." The idea, then, that the Constitution cannot be carried into effect because the government has no right to execute it, may probably be considered as obsolete.

In regard to any supposed danger of collision between the government and the States, as co-ordinate powers, all reasonable fears of such a result are understood to have passed by. The complete supremacy of the general government, as to all matters coming within its sphere, with the "reservation" to the States of a part only of the "powers not delegated to the United States," connected with the right of final decision, through its Judiciary, of all cases "arising under this Constitution," renders it perfectly certain that no such difficulty can ever arise. If an act of the general government is constitutional, — and this they must decide for themselves, — all question in regard to its validity is ended. The great purposes and objects for which the government was instituted are few and specific; but in the selection of means for their accomplishment, in deciding what may be "necessary and proper for carrying them into execution," under all the varied exigencies of times and events, the field is as broad as the whole range of legislative power. Of course it can never be known, *a priori*, to what extent, and in what direction, the public exigencies may require an interference with the local and domestic arrangements of the people, on the part of the government. No specific interference is excluded, under all circumstances, or in the nature of things can be; for the power that is responsible for the public defence and safety has, and of necessity must have, entire control of the physical and moral resources of the nation, and those who unwarrantably thwart its exercise render themselves responsible for its failure.

Though the Constitution confers no powers directly on the State governments, and none are "reserved" to them but "powers not delegated to the United States," it has not been unusual for State legislatures to pass laws on subjects expressly as well as impliedly within the legislative power of Congress, provided such laws did not interfere with any law of Congress in actual force and operation at the same time. It is on this principle that State bankrupt laws, under certain circumstances, are considered legitimate. In all such cases, however, and in all others where State legislation may be well authorized and entirely unobjectionable, considered by itself merely, its "validity will depend on its interfering with, or

being contrary to, any act of Congress passed in pursuance of the Constitution." In the case of Gibbon *vs.* Ogden, the Court say: "The nullity of any act inconsistent with the Constitution is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." Thus it is apparent that there can be no collision between the Union and the States, as co-ordinate powers in legislation, on any subject; for the United States are always supreme, wherever their power constitutionally extends.

If the trial of the Constitution thus far may be considered to have established these two points, — that the government has the power, and is in duty bound, to execute the whole and every part of the Constitution, and that its rightful authority cannot be rightfully counteracted by any subordinate power, — we may proceed to examine the practical operation of some of its details.

The introductory clause of the Constitution states that it was made by the "people of the United States," for "themselves and their posterity," — "the United States"; and "in order," 1. "to form a more perfect union," 2. "to establish justice," 3. "to insure domestic tranquillity," 4. "to provide for the common defence," 5. "to promote the general welfare," and 6. "to secure the blessings of liberty." It has been said that this statement of the objects and purposes of the Constitution does not confer any power on the government created by it, nor enlarge or diminish any power otherwise conferred; but it is nevertheless true that it discloses the design and intent with which the powers were given, and of course furnishes a rule by which those powers are to be understood and construed. They were designed and conferred to

effect the six specified objects, and should be allowed and made to do so, if by law they may. The specified objects comprise all the ingredients of a perfect government.

The Constitution was "ordained and established" for the whole body politic, the United States, by the people thereof. Who are the people of the United States? Chief Justice Taney says: "The words *people of the United States* and *citizens* are synonymous terms, and mean the same thing. They both describe the political body who . . . . . form the sovereignty, and hold the power, and conduct the government through their representatives. . . . . Every citizen is one of this people, and a constituent member of this sovereignty." Mr. Attorney-General Bates says: "The Constitution uses the word *citizen* only to express the political quality of the individual in his relations to the nation, to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. . . . . The phrase, *a citizen of the United States*, without addition or qualification, means neither more nor less than a member of the nation." "People of the United States," "people of the several States," "citizens of the United States," "citizens" and "inhabitants" of particular States, and of the several States, are parallel expressions often used in the Constitution. The Chief Justice speaks of citizenship "by birthright," which the Constitution also recognizes, and the Attorney-General says: "Every person born in the country is, at the moment of birth, *prima facie*, a citizen. . . . . That nativity furnishes the rule both of duty and of right, as between the individual and the government, is an historical and political truth so old and universally accepted, that it is needless to prove its authority."

Who, then, constitute the "nation," the "body politic," the "constituent members of the sovereignty," is determined by the "census or enumeration" directed by the Constitution to be taken every ten years. By the numbers so ascertained, the right of representation "by the people of the several States" is apportioned. It makes no difference, in this respect, whether men, women, and children of all classes are reckoned as exactly equal, or whether five of one sort are only equal to three

of another; in either case they all form a part of the representative population, a part of the "people of the several States," by whom the representatives are chosen, and that whether the whole, or only one fourth part, or, as in some of the States, only a sixteenth part of the people are actually allowed the right of suffrage. This enumeration includes the whole nation, the body politic, "the constituent members of the sovereignty," — every inhabitant of the land, except "Indians not taxed." The Constitution excludes these, because, although they belong to the country and are under the protection of the government, they yet form separate tribes under their own institutions, and are not in direct allegiance to the government of the United States. Every one else, without regard to age, sex, race, color, or condition, is included, as forming a part of the nation. "The people [*citizens*] of the several States," by whom representatives are chosen, are the people (*citizens*) of the United States domiciled in particular States. They are not all "electors," though they might be; and no others can be, because it would not, in that case, be a government exclusively by the people. There is no fitness in basing a representation, "apportioning it," on any other population.

If all the native-born inhabitants of the country, with the only exception of "Indians not taxed," are a part of "the people of the United States," and "citizens" by "birthright," according to Chief Justice Taney, or "natural-born citizens" in the language of the common law and the Constitution, it is pertinent to inquire, What are the *personal rights* recognized, conferred, or assured by the Constitution to such "citizens" in particular, and more generally to them in common with all other *persons* under the protection of the government? The legislature of Virginia say that there is *one*, and one only. It is in these words: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Citizens of each State are citizens of the United States, and as such entitled to all the rights guaranteed by this Constitution, not only in the several States, but everywhere else. The clause cited refers undoubtedly to privileges and immunities held in the several States exclusively under their own local laws. These shall be extended alike to all the

citizens of the United States when subject to those laws. It includes of course only those rights that belong to all as citizens simply, not those which are enjoyed by a part of the citizens in consequence of circumstances or qualifications in addition to citizenship, and independent of it. Probably, also, the State should not discriminate against new-comers in regard to such rights as require additional qualifications. If citizens, being also freeholders, are entitled to the right of suffrage, for instance, it would be invidious and inadmissible to say that one coming from another State, though he became also a freeholder, should not be so entitled. Chancellor Kent says that he is entitled to all the privileges of citizens of the same class, or standing in the same position.

The right of being represented in Congress is conferred directly by the Constitution. Members of the House shall be chosen "by the people of the several States," and "shall not exceed one for every thirty thousand." They may not all be voters, but no others can be, for the government must be of the "people." Citizenship by birthright is indirectly recognized as a personal right by the clause restricting eligibleness to the Presidency to "a natural-born citizen." The provisions respecting treason confer rights on citizens only, those owing allegiance to the country; for no others can commit treason. Those also respecting "capitation and other direct taxes" refer only to the people, the citizens; for they depend on the census, or decennial enumeration of the "persons" composing the representative population. The first amendment recognizes expressly "the right of the people to assemble and petition the government"; the second, "the right to keep and bear arms"; and the fourth, "the right to be secure in their persons, houses, papers." All these rights are held by the "*citizens*," the "*people*," under the assurance of the Constitution.

Divers other personal rights are held by all "persons" who live under the protection of our government, whether citizens or aliens, and by a similar guaranty. The right to personal liberty, and the writ of *habeas corpus* as one remedy for its violation, are necessarily implied in the clause which restricts the suspension of the writ. The right to *liberty* is still more broadly secured to every "*person*" by the fifth amendment.

The prohibition of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, and the grant of trial by jury in criminal cases, all secure personal rights to everybody. The same is true of the clause in favor of the claim of a person having legal right to the personal services of another. Besides the rights in the body of the Constitution, the amendments mention several equally applicable to every "person" who is subject to the government. "Free exercise of religion," "freedom of speech" and "of the press," the legal formalities of "warrants," exemption from trial for crimes unless on "indictment by a grand jury," from being a "witness against himself," being "deprived of life, liberty, or property without due process of law," having "property taken for public use without just compensation," "the right to a speedy and public trial" for crime, by a "jury of the State," on a known "cause of accusation," with witnesses in court, and assistance of counsel and witnesses in defence, with exemption from "excessive bail" and "cruel punishments," are among the important rights secured to *everybody* by these amendments.

To consider all these personal rights as *conferred* by the Constitution, and mere restrictions on the government, is to disparage the rights themselves, and to degrade the Constitution and the people who made it. They are regarded as inherent pre-existing personal rights, founded on the principles of eternal justice, and solemnly recognized in the Constitution, as to be protected and defended by the government against all assailants. It is a heresy not to consider them as inviolable personal rights under the guardianship and protection of the government. No subordinate power should be allowed to impair them. Is the general government to stand still and look on while the "people," its "citizens," or others under its protection, are hung, incarcerated, made slaves, their property confiscated, and other rights violated with impunity? The principles of our Constitution ought not to be so interpreted, nor the duty of the government so understood or performed.

Such being the rights of all "persons," citizens and others, recognized by our Constitution, it would hardly seem possible

to inquire further, What are the constitutional rights of slavery? Lexicographers define slavery as "the state of absolute subjection to the will of another." One in that state is "the property of his master." His body is not his own, but his master's, and, if protected at all, it is so on account of his master's interest alone. He cannot defend it himself, even for the sake of his master. He is a chattel, sold and transferred as property, and of course can have no rights. The distinction between *persons* and *property* was as well understood by the Convention as it is now, and when they decided that every man was a *person*, they decided that no man was *property*, and when they decided that every *person* had inherent or constitutional rights, they decided also that no *person* was destitute of rights.

Those bound to service for a term of years were *free persons*, those bound by a longer tenure were "*other persons*," and included as such in the enumeration of representative "persons," but nowhere as *property*. No distinction of race or color is recognized in the Constitution. The clause in regard to the "migration or importation" of *persons* prior to 1808, is now obsolete. It made no provision respecting the *status* of such *persons*, and Congress, by another part of the Constitution, had the right to make them all citizens by naturalization if they chose. This was well understood, and spoken of in the Convention. The only other place in the Constitution where slaves are supposed to be alluded to, is the clause respecting fugitives. Here the "persons" spoken of are considered as debtors, owing personal service, and are reclaimed for specific performance. The terms doubtless include the "free persons" mentioned in the first article as bound for a term of years, all apprentices, those bound by contract, and divers other classes of free "persons"; and if the Constitution anywhere established or admitted the *status* of slavery, or the right of *property* by one man in another, they might also include that. But slave or slavery, either in express words or by any circumlocution meaning the same thing, is not to be found in the Constitution. The subject of the absolute dominion of one man over the will and person of another, or the right of property in man, is not named or described by any

words whatever, in any part of that instrument, and of course is not recognized, sanctioned, or guarantied to anybody. The rebellion has furnished us with the honest opinion of the slaveholders themselves on this point. After clamoring against us for more than half a century for violating what they pretended to call the guaranties of the Constitution in favor of slavery, they now admit that the guaranties are not there, and supply the deficiency by placing them in their own Constitution.

The duties of the government are due to the "people," the "citizens," of the United States. They owe nothing to slaves, as such; for they ignore their *status*. They owe nothing to their masters, as such; for they ignore their assumed rights. The slaves must be a part of the "people," or they are no part of the nation. Assuming, then, that they belong to the nation, and are a part of the "people," it lies directly in our way to inquire by what powers of the Constitution the government can reach them so as to effect their personal and relative rights and duties. The idea has been so long and so sedulously inculcated by the Secession school of politicians, that slavery was something so sacred that it could not be touched, debated, or even considered, — that no petition from it could be allowed, and none respecting it could be answered, and that government could do nothing about it but defend and enforce it, — that we had come, from the mere force of clamor and habit, almost to the condition of actual belief that four millions of our people were absolutely beyond the protection of the Constitution, and out of the pale of the nation. But the rebellion, among all its other consequences for evil or for good, has fortunately set us free from this spell, and we are now at liberty to look into the Constitution and ascertain what our rights and duties really are.

All the slaves, as well as all the other inhabitants of the land, are either natives or aliens. If natives, they are citizens by birthright, which is the best right to citizenship, and with most of us the only right that we can boast of. If they are aliens, they may be naturalized and made citizens, at the will of the government. Probably there are now no persons except natives actually and legally held in servile bondage for the benefit of their masters. Aliens imported in 1807, or before, are

probably too old to have their labor of any value beyond the cost of their support. Those imported since were imported contrary to law, and even *State-rights* law would not support a title so acquired. If natural-born or naturalized citizens, they are entitled to all the rights, privileges, and immunities of other citizens under the Constitution, and subject to the same duties and liabilities, and no others.

Foreign territory has been acquired, and aliens of all colors, races, and conditions have been adopted and naturalized by treaty; both territory and people have been alienated and transferred, and duties and liabilities discharged and abolished in like manner; nor has it been doubted that other similar changes in the relations and obligations of individuals or classes could be made by the same power.

By the power to regulate commerce with foreign nations, Congress have prohibited the foreign slave-trade, punished the participants in it, and freed the subjects of it. By the power to regulate commerce among the several States, they may do the same with the domestic or inter-State slave-trade any day when they choose. The "*migration*" of persons, which Congress may prohibit after 1807, is not simply *immigration* from foreign lands, or *emigration* from our own, but *migration* especially from place to place within our own land. Many intelligent slaveholders have expressed the opinion, that slavery could not live after being circumscribed and confined to any limited territory. What, then, would be its fate if every slave were restricted to the place of his birth or present ownership, and made transferable only with the soil on which he labors? How long would slavery last in the Border States under such a regulation?

What may not Congress do, legitimately, with slaves or anybody else, under the power to declare and prosecute war? To raise and support armies and navies, they may enlist, draft, and even impress slaves, hired laborers, apprentices, minors, and others. It is believed that all these things have been done. By the power of "*organizing*" the militia, Congress provides for the enrolment of the militia, and by the express terms of the present law actually includes, and undoubtedly intended to include, every able-bodied man between eighteen and forty-

five years of age, belonging to the country, whether bond or free. No power is *reserved* to the States in the case, except to "*officer*" and "*train*" them "according to the discipline prescribed by Congress." Who will undertake to say what Congress may not accomplish, under the possible exigencies of the future history of the country, by the power to make all laws necessary and proper for executing the Constitution? In the selection of means they seem to have a *carte blanche*, as broad as the field of legislative power, and the States have none to interfere with it, for all their *reserved* powers are only such as are *not delegated* to the general government.

None of these passages in the Constitution say explicitly that Congress may emancipate all the slaves, or abolish slavery in the States, nor do they say that Congress may pass a fugitive slave law; but they obviously confer powers that may be used to "promote the general welfare" of the country, and the interest of the slave in particular, as well as the exclusive interest of the slaveholder. Doubtless it was not expected or intended that slavery should be at once abolished by the government, and the slaves set free; though such might have been the real effect of it if it had been administered, and its powers strictly enforced, in that spirit and for that object. But it was expected and intended that slavery should gradually die out, and in the mean time continue only by sufferance. No sanction was to be given to it, no permanence, and of course no recognition in the Constitution. The Constitution expressly recognizes freedom, and totally ignores slavery. Mr. Iverson of Georgia, in a speech in the Senate of the United States, December 5, 1860, said: "The power of the federal government could be so exercised against the institution of slavery in the Southern States, as that, without an *overt act*, [meaning without any violation of their rights according to their own construction of them,] the institution would not last ten years." The institution has been continued and strengthened through the sympathy and assistance of the general government; and if only a withdrawal of their patronage, and an indirect influence in favor of liberty, without any *overt act*, would accomplish its destruction in ten years, what might not be expected from "the swelling of Jordan"?

No part of the Constitution has been the occasion of more discussion than the first clause of the eighth section of the first article, relating to the "common defence and general welfare." The whole clause, as it now stands, is a piece of patchwork, in these words: "To lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." The section begins with the words, "Congress shall have power"; then follow the above and seventeen other separate items, each beginning a line, with a capital letter, and a verb in the infinitive mood; and ending with a semicolon and a break, as the end of a paragraph. The clause, though originally single, is now in three parts, embracing different subjects, introduced for different purposes, by different persons, at different times, separately discussed and matured, without any reference to each other, and finally thrown together, not on account of any congeniality, but merely for convenience in locating independent propositions not elsewhere disposed of. The first part, which was originally the whole, giving the power of taxation, was introduced May 29, 1787, as a part of the South Carolina plan, in the exact words in which it now stands, — "to lay and collect taxes, duties, imposts, and excises"; — forming the first item in the list of enumerated powers, drawn up in the precise form of the present eighth section. This plan, together with the New Jersey plan, and the Virginia plan as amended in the course of two months' discussion, was referred to a select committee for the purpose of reporting a Constitution. August 6th, the committee reported the "Draft of a Constitution," following in relation to the legislative power the form, and in most respects the substance, of the South Carolina plan, in eighteen distinct items. These items were more or less altered in the progress of discussion; but in form the eighth section is the same as reported by this Committee of Detail, and as it was originally in the South Carolina plan; and in relation to this power of taxation, and several others, it remains through all its stages precisely in the words originally proposed. No qualification, limitation, or alteration of any kind, except an exemption of

exports, was asked or suggested by any one to the first clause as it then stood. It was concluded that this was not the proper place for the exemption of exports, and the taxation clause passed, August 16th, almost unanimously, in the words now composing its first line.

The second part of the clause, "to pay the debts and provide for the common defence and general welfare" of the United States, was much longer under consideration, and assumed many different forms. On the 18th of August, Mr. Madison and Mr. Charles Pinkney proposed sundry additional items of legislative power, in the same form as those already adopted, and among them this, "To secure the payment of the public debt"; — all of which were referred to the Committee of Detail, whose first report was still under examination. On the same day, Mr. Rutledge moved and obtained a "Grand Committee" of one from each State, to consider the assumption of all the State debts. The "Grand Committee" reported on the 21st, embracing both subjects, as follows: "The legislature of the United States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several States during the late war, for the common defence and general welfare." Which report was laid on the table. The next day the "Committee of Detail" reported an addition to the taxing clause, as follows: "For payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue except what may be appropriated for the payment of interest on debts or loans, shall continue in force for more than —— years." At the same time the report of the "Grand Committee" was taken up. The words, "The legislature shall have power to fulfil the engagements which have been entered into by Congress," being under consideration, Mr. Ellsworth "argued that they were unnecessary. The United States heretofore entered into engagements by Congress, who were their agents. They will hereafter be bound to fulfil them by their new agents." Mr. Randolph "thought such a provision necessary; for though the United States will be bound, the new government will have no authority in the case, unless it be

given to them." Mr. Madison "thought it necessary to give the authority, in order to prevent misconstruction. He mentioned the attempt made by the debtors to British subjects, to show that contracts under the old government were dissolved by the Revolution, which destroyed the political identity of the society." Mr. Gerry "thought it essential that some explicit provision should be made on the subject; so that no pretext might remain for getting rid of the public engagements." Mr. Gouverneur Morris "moved by way of amendment to substitute, 'The legislature *shall* discharge the debts and fulfil the engagements of the United States,'" which was agreed to, — all the States voting in the affirmative. Thus far it is obvious that the sole and exclusive object of what is now the second part of the clause was to confer a distinct, substantive additional "*power*" to pay the existing debts, and in the last resort to *require* the exercise of it.

On the 23d of August, this additional substantive "power" and "duty" was first incorporated into the first clause of the eighth section, as follows: "The legislature *shall* fulfil the engagements and discharge the debts of the United States; and shall have power to lay and collect taxes, duties, imposts, and excises." In this form it again passed the Convention; but Mr. Butler feared that it would compel the payment of the speculating holders of the debt, while he wished to discriminate between them and more meritorious creditors. He therefore, August 25th, moved a reconsideration. Colonel Mason said that "shall discharge the debts" was too strong; and he was afraid it might extend to all the old Continental paper. Mr. Langdon wished only to "leave the creditors *in statu quo*." Mr. Gerry thought the debt ought to be paid. "Stockjobbers kept up the value of the paper. Without them there would be no market." Mr. Butler "meant neither to increase nor diminish the security of the creditors." Here Mr. Randolph moved to postpone the clause, in favor of the following independent proposition: "All debts contracted and engagements entered into, by or under the authority of Congress, shall be as valid against the United States, under this Constitution, as under the Confederation." Dr. Johnson said, "Changing the government cannot change the obligation of the United

States." Mr. Gouverneur Morris was for a "compliance with public faith. He was content to say nothing, as the new government would be bound, of course; but would prefer the clause with the term *shall*, because it would create many friends to the plan." Mr. Randolph's proposition was then agreed to, and now forms an independent clause of the sixth article.

But Mr. Sherman still "thought it necessary to connect with the clause for laying taxes, duties, &c. an express provision for the object of the old debts, &c., and moved to add," — "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare." But, says Mr. Madison, "the proposition, as being unnecessary, was disagreed to, Connecticut alone being in the affirmative." Thus the additions to the taxing clause, made or proposed, all related to the old debts, and involved an additional substantive "*power*" to pay those debts; and none of them related at all to any desired qualification, limitation, or explanation of the taxing power, as originally conferred.

August 25th, an independent proposition, prescribing the rule of uniformity in regard to duties, imposts, and excises, was made and referred to a committee, who reported it, August 28th, in the following form: "All tonnage, duties, imposts, and excises laid by the legislature shall be uniform throughout the United States," which, with the omission of the word "tonnage," was adopted, August 31st, without any reference to the taxing clause, but connected with the sixth clause in the ninth section of article first.

On the same day, Mr. Sherman moved and obtained a committee of one from each State on "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on." Mr. Sherman was himself a prominent member of this committee, which reported, September 4th, the taxation clause in a form embodying his rejected amendment, and which was now agreed to without debate or opposition in the following words: "To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States." Before this final alteration it was, — "The legislature *shall* fulfil

the engagements and discharge the debts of the United States, and shall have power to lay and collect taxes, duties, imposts, and excises." The differences should be carefully noted; —

1. The transposition of the two parts of the clause, "debts," and "taxes."

2. The change of the *requirement* to pay into a discretionary power.

3. The omission of the other *engagements* besides "debts."

4. The addition of "common defence and general welfare."

On these it seems obvious to remark, that neither one nor all of them could have been considered or intended to make any important change in the interpretation, or any substantial alteration in the effect of the clause. The first, the transposition, certainly could not. The subject had been critically examined and much debated, and the clause had passed with general acceptance as it stood. The change was made suddenly, with little consideration, no debate, and no opposition, which is not the course with changes of essential importance. The second removed the only objection which had been made to the original form of the clause. The third, relating to other "engagements," had been provided for in the sixth article. The fourth had been rendered absolutely necessary, in order "to exclude a conclusion." While the taxing power stood alone, or at the end of the clause, no one could doubt that the taxes were to be raised for the general purposes of the government. Of course, to have added "for the common defence and general welfare," would have added nothing to the power conferred by the clause. But when the parts were transposed, and the power to pay the debts followed the power to lay and collect taxes, the necessary conclusion would have been, that the taxes were laid, not for the general purposes of the government, but solely to pay debts, this being the only purpose named. Hence the absolute necessity of superadding those general purposes in the comprehensive summary used in the Constitution, "and to provide for the common defence and general welfare."

It will be seen by the foregoing historical sketch of the debates, that the Convention had determined to give Congress an express substantive power to pay the precedent or existing debts of the United States, in addition to the general recogni-

tion of their validity contained in the sixth article. This had now, almost by accident, become an appendage to the power of taxation. Those debts were to be paid, or at least might be paid, by the use of money raised from taxation. It would not answer to say that Congress might tax the people to pay those debts, and stop there; because that would not only exclude all the other purposes for which taxes were wanted and might be collected, but would also exclude the payment of the debts by any other means, neither of which was intended. The almost indefinite power of taxation, as well as all the other powers of the government, is given for the purpose of accomplishing all the objects of the Constitution. No part of these could be omitted, and they are all included in this short summary. The sole object of the whole addition to the taxing power was to delegate to the new government a "power" to pay the debts of the old. No desire to alter the magnitude or extent of the taxing power, by way of qualification, limitation, or amendment of any sort, was suggested. The added "*power*" authorized the payment out of the revenue raised by taxation. But they being recognized as "debts" of the nation, and their payment authorized, directly and expressly, it is not to be supposed that they might not be paid out of any funds at the disposal of the government, as well as those created by taxation. Accordingly, we find that these same "debts" were afterwards actually first secured, and then paid out of the proceeds of loans, bank stock, sinking fund, and public lands, as well perhaps as from other resources. And when the clause proceeds also to delegate a similar "power," "to provide for the common defence," is it supposable that this is to be done exclusively in the use of the single power of taxation, and not by all the powers of the government under the Constitution? This last would have been the case though the power of taxation had not been given at all. The same may be said of the other "power," conferred in the same connection, "to provide ..... for the general welfare," however it may be construed, and there can be no reasonable doubt that it includes the designated objects of the government, namely, "union," "justice," "domestic tranquillity," the "blessings of liberty," and all the powers conferred to promote them, whatever else it may or

may not include. If Congress may regulate commerce, coin money, establish post-roads, support armies, maintain navies, carry on war, and make all laws necessary and proper for these and all other purposes of government, undoubtedly they may raise and appropriate money for such internal, as well as external, establishments and works as are adapted to promote them. This, by the express terms of the clause under examination, may be done in the use of the revenue obtained by the power of taxation, and it may and must be done by the execution of all the other powers of the government, which were delegated for this special purpose, and this only.

Thus we see that the whole object of the Convention, in making these additions to the taxing power, in either form, was to provide for the Revolutionary and Confederation debts. This was done by "delegating" a new "power" to Congress. It made no difference as to the fact of the grant of "power," whether "to pay" was compulsory or discretionary, or whether it was arranged before or after the "power" of taxation; but if it followed "the power of taxation" in the arrangement, as was finally determined, it became necessary to include in the same "grant of power" all the other objects for which revenue from taxation might be used, to bar an implication that it was applicable to this purpose and no other. Hence they were subjoined in the apt words, "and provide for the common defence and general welfare."

The express power here granted "to pay the debts," refers to the debts of the Confederation only. No one doubted or questioned the right of the government to pay any debt they had a right themselves to contract. The only question was, and the only "power" now asked was, as to the payment of pre-existing debts. These having all been paid, this power has become obsolete. The other provisions in this connection include all the purposes for which the Constitution was made and the government instituted, which may be executed by means of laying and collecting "taxes, duties, imposts, and excises," or by doing anything else for which authority is vested by the Constitution in the government, or in any department or officer thereof.

The remaining inquiry proposed relates to the third or last

part of the taxing clause. This is one of the three only qualifications of the taxing power contained in the Constitution. Direct taxes are to be laid by the rule of apportionment, indirect by the rule of uniformity, and exports are to go free. The first and the last provisions are in other parts of the Constitution. The second is here. How and when came it here? This and two other independent propositions now in the fifth clause of the ninth section of the first article were agreed to, August 31st. The Committee of Revision, which made the final arrangement of the articles agreed upon, reported, September 12th, accidentally omitting the three items of that vote. The omission was discovered quite at the heel of the session, and on the day preceding the engrossment for signature they were separated for no apparent reason, and two of them placed in the fifth clause of the ninth section, while this, "but all duties, imposts, and excises shall be uniform throughout the United States," was added to the first clause of the eighth, without debate, apparently without consideration, and without objection. This shows at least that, whatever motive might have occasioned such a disposition of them, there could have been no intention, and no suspicion, that the least possible effect or influence was produced thereby on the construction or interpretation of either of the clauses to which addition was thus summarily made. So the first two parts of the taxation clause have the same force and effect, and should be construed in the same manner, as though the "uniformity" part had been left where it was originally, in connection with the matters in the fifth clause of the ninth section.

The foregoing exposition of the first clause of the eighth section has been made upon the presumption that it means what the Convention intended and endeavored to make it mean. If any different construction is attached to it, it ought at least to be left in the shape they gave it. The Committee introduced it in two parts, reversing the former arrangement, placed a semicolon between them, as before, and after the manner of every other clause in the section; and in this form it was passed without a dissenting voice by the Convention. In the same form it was reported by the Revisory Committee, and again passed unanimously. Judge Story says that "the clause

was separated from the preceding exactly in the same manner as every succeeding clause was, namely, by a semicolon and a break in the paragraph; and that it now stands in some copies, and, it is said, in the official copy, with a semicolon interposed."

Mr. Madison, however, uniformly omits the semicolon, and says that the clause ought not to be so separated. He says, also, that his is "an exact copy" of the original report, and that "the variations in the printed journal are occasioned by its incorporation of subsequent amendments." But as no amendments were made in this part of it, this reason for a change in the punctuation would not apply. He says, in regard to the revisory report, that his "is a literal copy." It is undoubtedly so, as he says, *literatim*, but may not be so *punctuatim*. Mr. Brearly, who was chairman of the first committee, and also furnished the copy of the revision for the journal, is more likely to be correct in this respect. But, after all, it is not certain that the difference is very material, for Mr. Madison, in his report on the Virginia Resolutions of 1800, says: "There is not a single power whatsoever which may not have some reference to the common defence or general welfare, nor a power of any magnitude which in its exercise does not involve or admit an application of money. The government, therefore, which possesses power in either one or the other of these extents, is a government without limitations, formed by a particular enumeration of powers." He therefore proposes to construe it away entirely, and thus substantially to put it out of the Constitution. This is undoubtedly the safest course; for it has always been a troublesome passage for all that class of politicians. But the stubborn fact is, that it is there bodily, and is really valid in both aspects, having been passed expressly for the purpose of conferring additional, direct, and substantive power, and incidentally authorizing the execution of it by means of taxation, as well as by all the other powers of the government.

The commercial power, so far as it respects foreign commerce, has been pretty thoroughly developed in practice. Congress has not only exercised a wholesome control over commerce, but has encouraged, assisted, protected, and de-

fended it by a great variety of means, has at times restricted, hampered, and embarrassed it by annoying regulations for political objects, and has once actually abolished and destroyed it altogether for the time being by a law permanent on its face, though afterwards repealed. These measures have been generally approved by the nation, and sustained by all departments of the government, — the last probably not so much on the ground of its being a wise exercise of the legislative power "to regulate commerce," as because it was an actual exercise of political power, which the legal discretion of the judiciary had neither the right nor the ability to control. As to internal or inter-State commerce, almost nothing has been done. The power over it is in the same terms as the other, and equally extensive, and may be as broadly exercised whenever the exigencies of the times shall, in the wisdom of Congress, be thought to demand it.

Congress has the exclusive right "to coin money and regulate the value thereof." To coin is to make, form, or fabricate. Shakespeare's "*coinage* of the brain" was a fabrication. Dryden says, "Those motives induced Virgil to *coin* his fable." "Government *coins* money"; rogues "*coin* lies"; "fools *coin* words." The "value thereof" relates entirely to the value given to it by the government as money. No reference whatever is anywhere made to its having any value otherwise. Nothing is prescribed in regard to the substance to be used. It is usual to have money authenticated by a government stamp, and if the verb *to coin* absolutely includes such a stamp in the case of *money*, as it does not in the other cases cited, then it must be admitted that the substance required by the Constitution must be material. But it may well be doubted whether any such stamp is absolutely essential. Perhaps Congress might authorize something to be used as *money* in exchanges and payment of debts, as Virginia once did with *tobacco*, without any stamp whatever. However this may be, there is nothing in the Constitution requiring the substance to be mineral or vegetable. Both were in use for the purpose at the time the Constitution was made, and it prescribes neither. Its value as money depends on the regulation of Congress, and whether it has any and what value otherwise is entirely imma-

terial so far as its legality is concerned, though not as to its expediency. When the Constitution was made, the mineral currency of the country consisted of gold, silver, and copper. Congress soon afterward authorized a new coinage of all three, and they have since added nickel to the list. No doubt they had the same legal right to use iron, tin, or lead for the purpose. There was an attempt made in the Convention to exclude paper; but the expediency of this was doubted by many. It was said that the war of the Revolution could not have been sustained without it; and the efficacy of such a prohibition was doubted by many more. Congress had and must have the right to borrow money. If so, they must promise to pay. The value of the promise would be influenced by the facility of transfer. So the restriction was abandoned.

Whatever is legal money must be used as such, in all exchanges, payments, and transactions of business requiring it. Every contract has reference to the legal currency, the lawful money of the country. Congress, having the sole right to say what shall be money, must of course regulate the whole matter. The States cannot make money, emit bills, or even render the United States copper and nickel coin a legal tender. Mr. Webster said, nearly thirty years ago: "It is an imperative duty imposed upon this government by the Constitution, to exercise a control over all that is in the country assuming the nature of a currency, whether it be metal or whether it be paper; all the coinage of the country is placed in the power of the federal government; no State, *by its stamp*, can give value to a brass farthing." He added: "The power to regulate commerce between the States carries with it, not impliedly, but necessarily and directly, a full power of regulating the essential element of commerce, namely, the currency of the country, the money, which constitutes the life and soul of commerce."

The only reference in the Constitution to the writ of *habeas corpus* is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This language implies the existence and universality of the privilege or right. If it did not exist, it could not be suspended, and to prohibit the suspension would be idle. The language also im-

plies that the existing privilege may be suspended in the specified cases. Saying that it "shall not be suspended" in other cases, implies that it may be in these. If it may be suspended or temporarily taken away in any case, it must be or remain until it is taken away. The clause, therefore, relates to an actually subsisting right or privilege. No argument is necessary to prove that the writ thus mentioned is the great prerogative writ, for the protection of personal liberty, known to the common law as the writ of *habeas corpus ad subjiciendum*. Personal liberty, then, being the purpose and object of the writ, is itself recognized and secured as a right, by the same provision which recognizes and secures the writ itself as one remedy for its violation. The recognition makes them both actual constitutional rights; but in order to be thus recognized they must have been pre-existing rights independent of the Constitution. How came they so?

Our fathers lived under the common law in England, and brought it with them when they emigrated to this country. They always claimed it as a part of their rights and liberties while they remained the King's subjects. The Congress of 1774, the first Representatives of our Union, in their famous Declaration of the Rights of the Colonies, asserted that "they are entitled to the common law of England," and such of the English statutes as they have "found to be applicable to their local and other circumstances." The right protected by this writ, and the use of the writ itself for the sake of that protection, were claimed and exercised here up to the time of the adoption of the Constitution. The clause itself has no meaning independent of the common law. What *habeas corpus* is in the Constitution cannot be ascertained, otherwise than by the common law, any more than the meaning of *bills of attainder* and *ex post facto* laws. The "privilege" thus secured from "suspension" by this clause is that of the common law writ for the protection of personal liberty, and it is immaterial whether it refers to the writ itself or to the action of the writ. So the Constitution re-enacts the common-law right to personal liberty, and to this writ, as one remedy for the violation of it. Both are founded in the common law, and are to be construed by it. The fifth amendment expressly recognizes "liberty"

as the constitutional right of every "person," and the fourth restrains all "seizures of persons." The Introduction speaks of the security of the "blessings of liberty" among the objects of the Constitution, but no other clause in the body of the original instrument actually implies and necessarily secures the right to every one. This clause does so, and if it had not been a common-law right before and at the time of the adoption of the Constitution, this clause would have conferred it. Saying that it shall not be temporarily taken away, "unless," &c., is equivalent to saying that it shall be constantly enjoyed, "unless," &c. This is consistent with the analogy of the language used in other parts of the Constitution. Section third of article first makes the Vice-President the presiding officer of the Senate, but says he "shall have no vote, unless," &c. This negative form of expression gives him a casting vote in case of division, and his right to such a vote rests on this ground, and no other. By section ninth of article first, the migration of persons "shall not be prohibited by Congress prior to the year 1808." The general power to prohibit it is included in another provision; but if it were not, it would be conferred by this after 1807, by necessary implication. In the same section we have, "No capitation tax shall be laid, unless," &c., necessarily implying the power, if used in the manner proposed. Congress shall meet every year on the first Monday in December, "unless they shall by law appoint a different day," which is equivalent to saying that Congress may appoint by law any other day they please. These are only a part of the instances in our Constitution where a positive right or power is asserted or affirmed by a negative form of expression, which purports only a limited denial. The *habeas corpus* clause, therefore, while purporting only a limited denial of the power of "suspension," actually asserts that power in appropriate circumstances, and at the same time, *eodem flatu*, affirms the right to the writ, as the appropriate remedy for the violation of the recognized constitutional right of personal liberty, that being the only right to which this writ is applicable. Other and less important purposes, to be sure, are answered by process under this general name, but this is mainly intended, and, if it was not, is certainly included. The right of personal liberty, with the right to the remedial writ of *habeas*

corpus for its violation, and the power of suspension, under certain circumstances, are all, indirectly and by necessary implication, provided for in this clause of the Constitution.

But though these rights are recognized and guaranteed by the Constitution, they are not all rendered practically available by it, independently of legislation. Morgan might have been seized, imprisoned, transported, and executed, notwithstanding the Constitution assured to him his liberty and the writ of *habeas corpus*. The Constitution effected no more on this than it did on the subject of bankruptcies. It gave power to Congress, so far at least as it respects the jurisdiction of the evil and the remedy. This power Congress exercised at its first session, in the passage of the Judiciary Act. By that, it authorized certain courts and judges to issue the writ, and to adjudicate the case. This jurisdiction, being conferred exclusively by Congress, is of course repealable at any time by Congress, either in whole or in part, temporarily or permanently. They can do this directly, or they can authorize the President to do it, or any part of it, by proclamation, or otherwise, as in regard to other laws. They have actually exercised this power by the *habeas corpus* act of March, 1863, not by virtue of any authority under the clause now under consideration, but by virtue of their general legislative power over the whole subject. This is manifest from their having placed all arrests, detentions, and suspensions of writs, made by authority of the President, during the rebellion, on the same ground, whether made before or after the act. They are all treated as equally legal, and dealt with in the same manner, so that the *habeas corpus* clause, so far as it might be supposed to relate to the power of Congress, is simply nugatory. It would neither increase, diminish, restrain, nor alter their power. Saying to the legislator, who makes or repeals, alters or renews the law, every day, just as he pleases, that he shall not " suspend " it, is as superfluous as to say to the traveller he shall not go to London by the way of the South Pole, when all other and better ways are everywhere open to him.

What, then, is the object of this clause? In construing the Constitution, it is necessary to assume that every part of it means something, and was introduced for some distinct pur-

pose. We have seen that this was not introduced with the design to limit or restrain the legislative power, because it has no such tendency, and can have no such effect. What, then, was the object of it? This must be answered by considering, first, what it authorizes to be done; secondly, when it is to be done; thirdly, why it is to be done; and, fourthly, by whom it is to be done. 1. It authorizes a suspension of a privilege, — the writ of *habeas corpus*, — not positively, by a direct grant of power to suspend, but negatively and indirectly, by imposing a restraint on a pre-existing power. 2. When may it be suspended? "In cases of rebellion or invasion." These are when there is internal war, civil or foreign; when the war power is called into exercise, and is supreme, for the public safety. Such cases are the only ones in which the suspension authorized by this clause is not prohibited. 3. Why is it then authorized? Because the public safety requires it; and also for the purpose of the prohibition at other times. 4. By whom may it then be done? Obviously by the power that is restrained from doing it till then. This cannot be Congress, because their power is not affected by the clause. The power that makes, alters, continues, or abolishes the law at pleasure, is not restrained by a prohibition to suspend. A very different article would be necessary to abrogate the legislative power. It cannot be the judiciary; because, whatever discretion they may lawfully exercise in refusing the writ under any circumstances, they are not officially in possession of the information that would enable them to do so for this cause. So it must apply exclusively to the executive, or war power. The rights of war are paramount to all others, as existence and safety are paramount to pleasure and profit; and those who exercise these rights disregard or suspend all civil rights standing in their way, and *habeas corpus* among the rest. It is this power only that the clause in question purports to reach and restrain, by prohibiting this particular exercise of it, except in the circumstances specified. It is extended not only to cases of actual war, when only martial law is in effective operation, but to internal war in distinction from external war, — to cases of rebellion and invasion; but even in these it is limited to the demands of the public safety. Such, then, is the obvious

purpose of this clause. It applies directly and exclusively to the executive. Any attempt to apply it to the legislative or judicial departments would render it totally useless and nugatory. It indirectly recognizes the general right to liberty, and to the use of this remedy; together with the occasional right of the war power, in appropriate cases, to interfere with both. Since the breaking out of the present rebellion, it has been so understood, used, and practised, with the general approbation of good and patriotic citizens; and by the *habeas corpus* act of March, 1863, it has received the full indorsement and sanction of the legislative department of the government. By that act the authority of the President, the commander-in-chief, is made a full and perfect defence, in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, "made or to be made, at any time during the present rebellion," whether instituted by *habeas corpus* or otherwise. It is to be hoped that the construction of the Constitution on this point, so used, approved, and sanctioned, may be considered as settled.

The common law of England is substantially the same. The king suspends the writ, and Parliament indemnifies his ministers. This is the established form of proceeding. But it is only a form, after all. The suspension is legal and valid, without regard to the indemnity; and if the sovereign should fail to make it in a proper case, and public detriment should accrue in consequence, no doubt his ministers would be held liable to impeachment for the neglect. Indemnity or no indemnity is only the mode of approving or changing the ministry. If Parliament should refuse the indemnity, the consequence would be that the ministry would resign, on account of the failure to carry a majority of Parliament to sustain them, but the validity of the king's act would not be in the least affected.

Under our Constitution the same form might be useful to the same extent of showing unity and strength in support of the government. But the disapproval of the legislature would not be attended with the same consequences in this country as in England. By our Constitution, the different departments of the government are intended to be separate and distinct, each acting independently, and on its own responsibility. This re-

sponsibility with the executive and judiciary is so concentrated as to be worth *something*. But with the legislature it is so diluted as to be of little if any efficacy. In England the omnipotence of Parliament effectually swallows up the other departments. One house exercises the supreme judicial power, and the other exercises the executive power, by controlling the ministry. The framers of our Constitution exhausted their wisdom in endeavors to find some check or restraint for the overwhelming supremacy of the legislative power. But it is to be feared that their failure in this respect will prove as signal, as in the mode of designating the executive.

ART. IV. — *Manual of Geology: treating of the Principles of the Science, with special reference to American Geological History, for the Use of Colleges, Academies, and Schools.* By JAMES D. DANA, M. A., LL. D. Philadelphia: Bliss & Co. 1863. 8vo. pp. 798.

WE suppose that no naturalist in this country has achieved a more distinguished position than the author of this Manual. Perhaps no other has attained equal eminence in two or more very distinct departments of scientific research. Beginning with inorganic nature, Professor Dana's System of Mineralogy — the work of his earlier years — gained at once, and in successive editions has maintained, the foremost rank. Advancing to the organic world, and to forms which, to the general apprehension, seem to combine stone, plant, and animal in one, in his splendid volume on the Coral-Zoöphytes of the South Pacific Exploring Expedition, he proved his talent for the higher order of morphological studies, elucidated the laws of growth, and revised the systematic arrangement of these curious animals and communities. One of his earliest publications was a brief and unpretending paper upon a minute crustacean animal; in later years his elaboration of the Crustacea of the Exploring Expedition, forming an ample volume or pair of volumes of the publications of that expedition, not